

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

UNITED STATES OF AMERICA

GOVERNMENT

V.

CRIMINAL ACTION NO: 1:16CR10

ROBERT E. SIMMONS

DEFENDANT

**TRANSCRIPT OF SENTENCING HEARING**

BEFORE HONORABLE HALIL S. OZERDEN  
UNITED STATES DISTRICT JUDGE

SEPTEMBER 15, 2016  
GULFPORT, MISSISSIPPI

COURT REPORTER:

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1           **THE COURT:** We are here this morning in criminal  
2 matter 1:16cr10, United States versus Robert Simmons scheduled  
3 for sentencing. Would counsel please make their appearances  
4 for the record?

09:11 5           **MR. GOLDEN:** Your Honor, this is Jay Golden on behalf  
6 of the United States, and with me at counsel table is Special  
7 Agent Tye Breedlove with the FBI.

09:11 8           **THE COURT:** Good morning.

09:11 9           **MR. HIGHTOWER:** Good morning, Your Honor. I'm K. C.  
10 Hightower on behalf of Robert Simmons, who is also present with  
11 me at counsel table.

09:11 12           **THE COURT:** Good morning, Mr. Hightower.

09:11 13           **MR. HIGHTOWER:** Good morning, Judge.

09:11 14           **THE COURT:** Now, Mr. Golden, pursuant to the Crime  
15 Victims Rights Act, are there any victims of this offense?

09:11 16           **MR. GOLDEN:** Your Honor, there are victims. The  
17 government basically is the victim in this case, and any  
18 notifications that the government was required to make it has  
19 made with regard to that.

09:12 20           **THE COURT:** Is there anyone here who is going to want  
21 to speak on behalf of the victim?

09:12 22           **MR. GOLDEN:** I'm not aware of any, Your Honor,  
23 certainly not on behalf of the victim.

09:12 24           **THE COURT:** All right. Has the government received  
25 the presentence report and had a chance to review it?

09:12 1 **MR. GOLDEN:** Yes, Your Honor.

09:12 2 **THE COURT:** Does the government have any objections  
3 to the presentence report?

09:12 4 **MR. GOLDEN:** No.

09:12 5 **THE COURT:** Mr. Hightower, did you receive the  
6 presentence report and any addenda and had a chance to review  
7 them with your client?

09:12 8 **MR. HIGHTOWER:** We received each of those and had a  
9 chance to review and discuss each of them.

09:12 10 **THE COURT:** Were you able to explain them to your  
11 client and answer any questions he had about them.

09:12 12 **MR. HIGHTOWER:** Yes, I was, Your Honor.

09:12 13 **THE COURT:** Did he understand them?

09:12 14 **MR. HIGHTOWER:** I believe he did, Your Honor.

09:12 15 **THE COURT:** All right. And I understand there has  
16 been an objection lodged. Is that correct?

09:12 17 **MR. HIGHTOWER:** Yes, Your Honor.

09:12 18 **THE COURT:** All right. If you would, state very  
19 briefly what that objection is, and then I will see if the  
20 government has any evidence or argument to offer on the  
21 objection.

09:12 22 **MR. HIGHTOWER:** Your Honor, our response to the  
23 presentence investigation report was I think pretty concise in  
24 that we didn't take issue with anything in the report except  
25 the imposition of the 18-point enhancement, we will call it,

1 for the net loss, and I know the Court has had the benefit of  
2 our reading of that. Citing as the primary basis for that, the  
3 *Klein* case from the Fifth Circuit handed down I believe in  
4 2008.

09:13 5 The government or United States Probation filed an  
6 addendum to their report and stands by their 18-point  
7 imposition and cites as its basis that an example contained  
8 within a comment to the guidelines provides authority for the  
9 notion that total profit, open quote, total profit, closed  
10 quote, is basically a synonym for net loss or intended loss.  
11 We disagree, and I guess to the extent that an example in a  
12 note could be considered authority, then it should be  
13 recognized as such, but I think at most, that would be  
14 secondary authority.

09:14 15 We have got-- the Fifth Circuit has spoken to this issue  
16 pretty clearly, and I think that a review of the *Klein* case,  
17 while it does not say that you must take into consideration  
18 that part of fair market value that encompasses legitimate  
19 profit, a reasonable review of that case would indicate that.  
20 I know that the Court has read that case, but that case, of  
21 course, involved a physician who had apparently provided  
22 legitimate services but had committed fraud in the coding of  
23 it, and the question became how much should -- if you start  
24 with the general premise that all of it is a loss, how much of  
25 it should be credited and reduced by the fair market value of

1 the legitimate services provided? And I think in that case the  
2 government took the position that it would basically be the  
3 wholesale cost is what the credit would be equal to, and of  
4 course, that would leave a greater loss amount.

09:15 5 The defense took the position that, no, it would be  
6 whatever Medicare would have paid for the medications because  
7 they got the medications. He just billed it as though he  
8 administered it rather than it being administering at home.

09:15 9 I think a reasonable inference from that is that -- and I  
10 think there's even a statement in there, Judge Ozerden, that  
11 says it's not what the doctor would have paid for the  
12 medications but what Medicare would have paid. And so that --  
13 it would include a markup.

09:15 14 The FBI is here, and to the extent that the government  
15 contests it, which I don't think they will, I think the FBI  
16 would indicate that these were government contracts that the  
17 State of Mississippi and/or Harrison County received legitimate  
18 services for and would have paid substantial sums for. If the  
19 government does not, you know, acknowledge that, then I will  
20 need to probably put on some short testimony with  
21 Mr. Breedlove, but I think they do. It's just an  
22 interpretation of the guidelines such that United States  
23 Probation believes that any and all profit should be loss, and  
24 we don't believe that's a correct interpretation.

09:16 25 I think that to put it -- to break it down, I think that

1 profit can be illegitimate if the government could demonstrate  
2 that part of the profit earned was, for lack of a better term,  
3 profit too much. I think at that point there would be an  
4 argument that, you know, that should not be added to the credit  
5 because that's profit directly attributable to the bribe. And  
6 I really think that that's probably what the example stands to  
7 mean. I've read it, and I know that what Mr. Alexis has done  
8 is not illogical. I just think that it is inconsistent with  
9 what the Fifth Circuit has said.

09:17 10 At the end of the day, these are big dollar contracts, but  
11 I think the concept is the same. If somebody paints your house  
12 for a hundred dollars, it stands to reason that that's going to  
13 include some profit, you know, and if everybody's house in the  
14 neighborhood is getting painted for a hundred dollars, you  
15 know, then the fair market value of those services is not just  
16 the cost of the paint and the labor, but it's also the profit.  
17 Now, if you find out that you paid \$900 for your house to get  
18 painted, then perhaps the \$800 is profit too much. There's  
19 been no evidence provided by the United States Government that  
20 any part of this profit is profit too much.

09:17 21 And I know this sounds perhaps bizarre, but I think I  
22 would be remiss not to mention it. The procurement of these  
23 contracts and the circumstances under which they were procured  
24 was criminal, and so the gist of my argument is not that Mr.  
25 Simmons is beyond punishment. It's that he is not -- he

1 shouldn't be subjected to the 18-point enhancement. You could  
2 have a situation where, and I think these -- I don't know that  
3 these necessarily were that way, but you could have a situation  
4 where contracts required bids, and the head of the agency  
5 disclosed illegally to a vendor what the low bid was so that  
6 his friend could bid below it and be awarded the contract. In  
7 that case, assuming the government was provided with a  
8 legitimate service, not only would there not be a loss. The  
9 government would have actually saved money. It would have been  
10 an illegal contract, of course, but there would have been no  
11 loss per se, assuming that the government got the benefit of  
12 the contract.

09:18 13 And while this is not exactly that way, I think that the  
14 logic applies. And, you know, the magnitude of these contracts  
15 is such that, you know, there's nothing to suggest, at least in  
16 the record, that anything about the profit was profit too much.  
17 And as such, I think that the 18-point enhancement is not  
18 appropriate and that the Court should net that out of the  
19 guideline calculation.

09:19 20 **THE COURT:** All right.

09:19 21 **MR. HIGHTOWER:** Thank you, Your Honor.

09:19 22 **THE COURT:** Mr. Hightower, just a point of  
23 clarification. Am I correct to infer from your comments that  
24 there's really no dispute about the underlying facts as they  
25 are stated in the presentence report? This is more a matter of

1 legal interpretation of the guidelines.

09:19 2 **MR. HIGHTOWER:** Yes, Your Honor. That is our  
3 position. And, you know, if the government -- and of course,  
4 the United States Probation says as much with respect to the  
5 contracts. It says we are not -- I think the term he uses is  
6 inferring, whether he means inferring or implying -- that the  
7 government didn't receive the services. It's just that  
8 Mr. Alexis takes the position that all of the profit ought to  
9 be -- none of the profit should go towards adding to the  
10 credit, and we simply disagree. Thank you, Your Honor.

09:20 11 **THE COURT:** Thank you. Let me hear from the  
12 government any argument or evidence on the objection.

09:20 13 **MR. GOLDEN:** Your Honor, at this time we would not  
14 intend to put on any evidence. I do want to I think correct  
15 Mr. Hightower with regard to what the government's position is.  
16 We believe the addendum adequately documents and supports the  
17 calculations and the loss amount, and I didn't hear, and the  
18 Court sought and obtained that clarification, that he wasn't  
19 arguing with the figures. He is just simply making a legal  
20 argument.

09:20 21 Now, our position is that to the extent that his argument  
22 exists under *Klein*, that it's been well accounted for in terms  
23 of the total value of these projects. We are not saying that  
24 the Walnut Grove Youth Correctional Facility wasn't built or  
25 that the East Mississippi Correctional Facility wasn't built,



1 but we have already backed out that these contracts were worth  
2 \$31,926,828.41, and the other one \$28,882,063. So we are  
3 only -- the probation office is only assigning a very small  
4 portion of that, which is that profit which was obtained by  
5 virtue of the bribery that exists in this case, the underlying  
6 bribery. So we think there's adequate evidence in the record  
7 and in the presentence investigation report which the Court can  
8 take account of with regard to this particular issue.

09:21 9 As I said, the FBI agent is here if the Court needs  
10 additional evidence, but it's not clear to me that that's  
11 necessary under the circumstances of this case, and we think  
12 that it has been adequately documented.

09:22 13 The information, Your Honor, as the Court knows, this has  
14 been continued once because there are several other individuals  
15 who are -- have their sentences pending before Judge Wingate,  
16 and there have been hearings there, and we have sought to  
17 obtain all the information we could to support the calculations  
18 that the probation office has made. The only information which  
19 we were not able to obtain came from Sentinel, which, you know,  
20 that's -- I'm just going to state that that's for another day,  
21 the fact that they can have contracts all over the United  
22 States and hide behind a London entity and refuse to give  
23 information to us, but we will deal with that in a separate  
24 matter. We have sufficient information for the Court to assign  
25 a calculation with regard to this case.

09:23 1           **THE COURT:** All right. Anything else you want to  
2 add, Mr. Hightower?

09:23 3           **MR. HIGHTOWER:** Briefly, just to address the point  
4 that Mr. Golden raised, I think he is right to the extent he  
5 said they have backed out the numbers such that all that  
6 remains that they are using is the profit. The problem is,  
7 they are using all the profit. And under Mr. Golden's logic,  
8 construction contracts have no legitimate profit, and that's  
9 just not -- that doesn't comport with reality, Your Honor, and  
10 it would be the government's obligation to demonstrate what  
11 part of that profit, how much of it too much is attributable to  
12 the actual bribe as opposed to profit on any other job.

09:23 13           I don't think there is a contractor in Mississippi that  
14 would be willing to build a 30 million-dollar facility without  
15 anticipation of some legitimate profit. And to the extent that  
16 the government can demonstrate that it was profit too much,  
17 well, then we will live with that, but I haven't seen anything,  
18 any evidence of that.

09:24 19           **THE COURT:** All right. Thank you. Well, I, of  
20 course, have reviewed the presentence investigation report. It  
21 is a very thorough report, contains a lot of information in it,  
22 and I do think all the facts are there to allow the Court to  
23 make a meaningful and informed decision as to sentencing and as  
24 to the objection.

09:24 25           And in this case, as the record reflects, the objection is

1 to an enhancement in the guideline calculations. So by way of  
2 review, essentially the guidelines in this case were calculated  
3 based upon the defendant's plea of guilty to a violation of  
4 Title 18, United States Code, Section 666(a)(2), which is  
5 essentially bribery concerning programs receiving federal  
6 funds. According to the guidelines manual, the applicable  
7 guideline is Section 2C1.1. And according to that guideline  
8 provision, the base offense level, if the defendant is not a  
9 public official, which is Mr. Simmons' case, is a 12.

09:25 10 Then there's a two-level enhancement which was applied in  
11 this case if there was more than one bribe involved, and as has  
12 been stated here, this case involves several contracts and  
13 payments on separate occasions pursuant to those contracts by  
14 Mr. Simmons to Mr. Epps, and in one case to a former Harrison  
15 County supervisor. So the two-level enhancement was applied.

09:26 16 And then we get to the meat of the coconut, the basis of  
17 the objection here, which is the 18-level increase which was  
18 then added pursuant to Section 2C1.1(b)(2), which reads as  
19 follows: That if the value of the payment, the benefit  
20 received or to be received in return for the payment, the value  
21 of anything obtained or to be obtained by a public official or  
22 others acting with a public official or the loss to the  
23 government from the offense, whichever is greatest, if that  
24 figure exceeds \$6,500, then the offense level should be  
25 increased by the number of levels from the table found at

1 Section 2B1.1 for the corresponding amount. And in this case,  
2 the probation officer, in calculating the guidelines, based on  
3 the evidence produced by the companies themselves were that AJA  
4 Management and Technical Services earned a profit of  
5 \$494,445.02, White Construction Corporation had a profit of  
6 \$5,864,453.41, Health Assurance profited \$403,863, and this was  
7 for the Harrison County Adult Detention Center medical  
8 contract, for a total profit of \$6,762,721.43.

09:28 9 And according to the table at Section 2B1.1 of the  
10 guidelines, the range where this would fall would be between  
11 three and a half million and nine and a half million dollars,  
12 and in that case, the Court is directed to apply the 18-level  
13 enhancement which is at issue here.

09:28 14 I would observe, as has been stated, that there was  
15 another contract involving Sentinel where no information has  
16 been produced. So to the extent there was any profit in that  
17 contract, that has not been counted against Mr. Simmons in this  
18 case because the information was simply not available.

09:29 19 After that, then pursuant to Section 2C1.1(b)(3), because  
20 the offense involved an elected public official or any official  
21 in a high level decision-making or sensitive position, in this  
22 case former Commissioner Epps, there's a four-level increase  
23 added. So the probation officer totaled all of those up and  
24 came to a final total of an offense level of 36, and then Mr.  
25 Simmons received a three-level reduction for acceptance of

1 responsibility pursuant to Section 3E1.1 of the guidelines,  
2 which places him then at an offense level of 33, with a  
3 criminal history category of I, and that yields a guideline  
4 range of imprisonment of 135 to 168 months. However, in this  
5 case, because the count of conviction has a statutory cap of  
6 ten years, the sentence cannot exceed 120 months. So that  
7 makes the guideline range 120 months.

09:30 8 So the issue, then, is the 18-level enhancement and  
9 whether that was properly applied. It does not appear to the  
10 Court that there's any objection or dispute in the record as to  
11 the monetary calculations themselves as to how the numbers were  
12 derived and how the profits were calculated, and so I do find  
13 that those numbers are correct and have been properly  
14 calculated and are supported by the record.

09:30 15 So that leaves, then, the center of the dispute, which is  
16 whether or not, given that there was a total profit of some  
17 \$6.7 million on these contracts, whether it's appropriate to  
18 use that approach to apply an 18-level enhancement.

09:31 19 I think one of the arguments that Mr. Hightower is making  
20 is as it relates to the *Klein* case. Also, it appears that part  
21 of the argument is whether or not there is a loss to the  
22 government here and whether that should be the measure of  
23 calculating the guidelines and that because his position is  
24 that there has been no showing of any illegitimate profit, that  
25 the loss really is zero, and therefore there shouldn't be an

1 18-level enhancement. And that is, true enough, something the  
2 Court of Appeals has suggested also in a recent case, *United*  
3 *States versus Harris*, 821 F.3d 589 from 2016. So under that  
4 approach, if the Court were to find that the fair market value  
5 of the services rendered to the government was equal to the  
6 total price of the contracts, meaning that the services  
7 rendered were provided and that because there's a natural  
8 assumption that there will be profit in any contract, the  
9 profit was legitimate, then there ought not to be an increase  
10 in the offense level as the guidelines have been applied in  
11 this case.

09:32 12 The problem is that Section 2C1.1(b)(2) makes it clear  
13 that loss to the government is just one of four possible ways  
14 to calculate the sentencing enhancement. So even if the Court  
15 were to find that the loss to the government is zero, the  
16 guidelines instruct the Court to use the greater of these four  
17 possible measures, loss to the government being only one of  
18 those, another being the value obtained by the public official,  
19 which in this case would be totaling up the bribes earned by  
20 the public officials who received them, or the value of the  
21 payment, which would then be the dollars paid out by Mr.  
22 Simmons himself, or the net benefit received in exchange for  
23 the bribe. And that's the approach the probation office  
24 determined yielded the greatest number, and therefore it was  
25 used in calculating the guidelines here.

09:34 1 In *United States versus Landers*, 68 F.3d 882, Fifth  
2 Circuit 1995, the net benefit calculation under this guideline  
3 was found to be equal to the total contract price less the  
4 direct cost incurred in performance of the contract, which is  
5 akin to the calculation the presentence report appears to have  
6 made in calculating the net value of the benefits received by  
7 the contractors. So given the information that was produced  
8 and available, which is the best evidence in the Court's view,  
9 the determination was made that -- and consistent with the  
10 example given in the guideline application notes, the costs  
11 were subtracted from the total payment on the contract to yield  
12 the net benefit to the companies, which was the profit. And  
13 that's where the \$6.7 million figure came from.

09:35 14 As stated, the argument that Mr. Hightower is making is  
15 based on the *United States versus Klein* case, which was a  
16 health care fraud case, which, among things, stated that a  
17 defendant is entitled to a credit discounting the actual losses  
18 from fraudulent claims by the legitimate value of medications  
19 or services the insurer or the government would have had to pay  
20 for anyway, even if the fraud had not occurred. So the  
21 following logic, as Mr. Hightower has argued, being that the  
22 government or the entities who were paying on these contracts  
23 to these companies would have had to pay this amount anyway in  
24 the legitimate course of business because profit is part of any  
25 kind of a contract of this nature, so, therefore, there would

1 need to be some evidence of what any kind of illegitimate  
2 profit or inflated profit, improperly inflated profit, would  
3 have been to correctly measure the net gain in this case, and  
4 he argues that there has been no evidence to distinguish  
5 between legitimate and illegitimate profit.

09:37 6 The Court is of the view that a reading of the guidelines  
7 in the cases instruct the Court to use whichever is the  
8 greatest of the four alternative calculations. In application  
9 note three to Section 2C1.1, the Court's view makes it clear  
10 that any calculation of the benefit received is the net value  
11 of the benefit. I do not read the -- I understand the  
12 distinction Mr. Hightower was trying to make, but I don't see  
13 that distinction drawn in the application note or the guideline  
14 or in the cases that address it.

09:38 15 And as has been stated in the guidelines at 2B1.1 and in  
16 *United States versus Roussel*, 705 F.3d 184, Fifth Circuit 2013,  
17 the Court does not have to determine the loss or benefit with  
18 precision but need only determine a reasonable estimate of the  
19 loss or benefit based on the information available. I think we  
20 have a reasonable estimate here based on the information  
21 available.

09:38 22 So my reading of the guideline is that this distinction  
23 that's being suggested by Mr. Hightower is not stated there,  
24 and I'm not of the view that it's appropriate for the Court to  
25 read a distinction in there that doesn't exist.



09:38 1 Now, I think there's some support for that in the case law  
2 as well. In the *Harris* case, for instance, which the Court  
3 stated previously, the defendant, Mr. Harris, was employed by a  
4 firm, and he was the one who facilitated the bribe and obtained  
5 the contract, but it was the companies, the third parties, that  
6 were the true beneficiaries of the government contracts, and  
7 Harris himself was not personally enriched in any way beyond  
8 his salary as an employee. However, the Fifth Circuit still  
9 stated in that case that it was appropriate to attribute the  
10 entire value of the fraudulently obtained contracts to Harris  
11 personally as the starting point for the loss calculation.

09:40 12 Now, of course, that was a case dealing with loss. And  
13 the Court -- the Fifth Circuit remanded for resentencing in  
14 that case and stated that the correct loss calculation would be  
15 the net value of the contracts equal to a total value of the  
16 contracts awarded to the companies less the fair market value  
17 of services rendered in performance of the contracts.

09:40 18 Now, these could be read, as the defendant has argued, to  
19 suggest that if you count legitimate profit as part of the cost  
20 of doing business, the loss could be calculated as zero. But  
21 again, the PSR does not recommend or suggest that the sentence  
22 be enhanced on the basis of a loss to the government. It's on  
23 the calculation of the net benefit received. And it does cite  
24 the application note that Mr. Hightower mentioned.

09:41 25 The example given is that a \$150,000 contract on which

1 \$20,000 profit was made was awarded in return for a bribe. The  
2 value of the benefit received is \$20,000. That's the quote  
3 from application note three to Section 2C1.1. As I stated  
4 earlier, I do not see any distinction drawn in there between  
5 what portion of the profit was legitimate and what portion was  
6 not. It simply speaks in terms of the profit.

09:41 7 And the Fifth Circuit has interpreted this question and  
8 held that the net value of the benefit received attributable to  
9 a defendant who obtains contracts as a result of bribery is  
10 measured from deducting direct costs from the gross value  
11 received and defining direct costs as all variable costs that  
12 can be specifically identified as costs of performing a  
13 contract. That is in the *United States versus Landers* case  
14 cited earlier. Also, *United States versus Griffin*, 324 F.3d  
15 330, a 2003 case, which cited *Landers* and found that the  
16 expected benefit to the defendant sentenced for bribery was the  
17 expected profit from tax credits obtained by means of the  
18 bribe.

09:42 19 Again, none of these authorities make a distinction  
20 between what portion of profit may have been legitimate and  
21 what portion may have been inflated. *Landers* seems to speak  
22 fairly clearly in terms of calculating the number by  
23 identifying the costs of performing the contract and then  
24 subtracting that from the gross value received, which would be  
25 the overall dollar figure of the contract.

09:43 1 It is interesting and I think persuasive to note that  
2 other circuits have followed the Fifth Circuit's approach in  
3 *Landers* in situations where illegal bribes were paid in order  
4 to obtain what would otherwise be legitimate contracts. For  
5 instance, the Third Circuit in the 2010 case, *United States*  
6 *versus Lianidis*, 599 F.3d 273, followed the Fifth Circuit's  
7 approach in *Landers* explicitly and said that the benefit  
8 received under Section 2C1.1 is the net value minus direct  
9 costs accruing to the entity on whose behalf the defendant paid  
10 the bribe.

09:43 11 Fourth Circuit in the *United States versus Harvey*,  
12 532 F.3d 326, 2008, finding that the benefit received was the  
13 eight-percent profit margin identified in the federal contract.  
14 *United States versus Devegter*, 11th Circuit 2006, 439 F.3d  
15 1299, following *Landers*, calculated the net value of the  
16 benefit received in a case arising from bribery in order to  
17 obtain a county bond refinance. *United States versus Sapoznik*,  
18 161 F.3d 1117, Seventh Circuit 1998, interpreted the relevant  
19 benefit received under Section 2C1.1 to be the profit made on  
20 the contract rather than the gross value of the contract.

09:44 21 Finally, the Second Circuit, *United States versus Glick*,  
22 142 F.3d 520, calculated improper benefit as the gross value of  
23 the commissions received as a result of a bribe, less any  
24 direct costs incurred by the defendant.

09:45 25 So under this approach, the Court is of the view that the

1 presentence report's calculations adhere to the Fifth Circuit's  
2 method of interpreting this guideline when talking about the  
3 net value of the benefit received. And, again, in all of these  
4 cases, the Court does not see any distinction made between what  
5 portion of the profit may have been normal expected profit and  
6 what portion may have been inflated or illegitimate. So while  
7 I understand the reasoning behind the defendant's argument, it  
8 does not appear to be supported by the text of the guideline,  
9 the application notes or the relevant case law.

09:46 10 I would also observe that there have been cases in which  
11 the Fifth Circuit has attributed all of the profits earned by  
12 an employer company to a defendant employee sales  
13 representative who had obtained contracts for the employer by  
14 means of bribery rather than limiting the value of the benefit  
15 received to the kickbacks accepted by the defendant personally  
16 or the value of the bribes themselves, and that was the *Landers*  
17 case. *Harris*, which the Court has discussed previously, is  
18 another example where the value of the contracts awarded to the  
19 defendant's employer served as the baseline for the  
20 calculations, even though the defendant himself was not  
21 enriched in any way beyond his salary.

09:46 22 So those fact patterns speak to what we have here, which  
23 is not exactly the same but similar in the sense that Mr.  
24 Simmons was not employed by any of these companies, but he was  
25 a consultant for them, an independent contractor, if you will,

1 and procured these contracts on their behalf.

09:47 2 Other circuits have taken this approach as well and have  
3 attributed the profits earned by a defendant's employer to the  
4 individual defendant who paid the bribe in order to benefit the  
5 employer. The Fourth Circuit did that in the 2012 case *United*  
6 *States versus Hamilton*, 701 F.3d 404, finding that the value of  
7 the benefit received was the amount of public funding secured  
8 by the defendant legislator on behalf of a state university in  
9 exchange for his employment by the university rather than the  
10 salary received by the legislator. *United States versus Cowen*,  
11 171 F.3d 796, Third Circuit, 1999, finding that a defendant  
12 salesman's sentencing enhancement should be based upon the net  
13 value derived from contracts obtained by the employer on whose  
14 behalf the defendant had paid the bribes rather than on the  
15 value of the bribes themselves or the money personally pocketed  
16 by the salesman.

09:48 17 So taking all of that into consideration and based upon  
18 the evidence of record here, I'm of the view that the weight of  
19 authority, not just in the text of the guidelines themselves  
20 but also in the Fifth Circuit and in other circuits, is that  
21 the approach taken by the probation officer in this case with  
22 respect to this sentencing enhancement is in accordance with  
23 the law and is the appropriate method. So for those reasons,  
24 the objection will be overruled. And that will be the judgment  
25 or ruling of the Court on the objection.

09:49 1 Based on the Court's ruling, then, the guideline  
2 computations will be as follows: The total offense level would  
3 be a 33. The criminal history category would be a I. As I  
4 stated earlier, the guideline range for imprisonment would be  
5 135 to 168 months, but that is statutorily capped at 120  
6 months. So the guideline range would be 120 months.

09:49 7 The supervised release range would be one to three years.  
8 The defendant would not be eligible for probation. The fine  
9 range would be \$17,500 to \$175,000. Restitution is not  
10 applicable. And there would be a \$100 special assessment.

09:49 11 Do the parties agree that those are the correct guideline  
12 computations based upon the Court's rulings on the objection?

09:49 13 **MR. GOLDEN:** On behalf of the government, yes, Your  
14 Honor.

09:49 15 **MR. HIGHTOWER:** Based upon the Court's rulings, yes,  
16 Your Honor.

09:50 17 **THE COURT:** The Court will adopt the presentence  
18 report and addenda in their entirety as the Court's findings of  
19 fact, along with the additional findings made here today. I  
20 also have some matters, then, that have been submitted to me by  
21 the government. Anything that needs to be added on that point,  
22 Mr. Golden?

09:50 23 **MR. GOLDEN:** No, Your Honor, not that I'm aware of.  
24 They speak for themselves.

09:50 25 **THE COURT:** All right. Mr. Hightower, I think you're

1 also conscious of what I'm referring to. Any comment on that  
2 at this point?

09:50 3 **MR. HIGHTOWER:** I am, Your Honor. Of course, the  
4 document, when filed, is restricted, but I have spoken with Mr.  
5 Golden this morning, and I am aware of the magnitude in terms  
6 of guidelines, to the extent it affects the guidelines, I'm  
7 aware of the magnitude associated with that motion.

09:50 8 **THE COURT:** Okay. I have considered that, and there  
9 have been materials submitted to the Court for in camera review  
10 which I have considered as well, and I'm of the view that that  
11 is an appropriate adjustment, so the Court will make it. And  
12 based on that, then, the guidelines would be adjusted. And by  
13 my calculation, the result would be a total offense level of a  
14 29, criminal history category of a I. The imprisonment range  
15 would then be 87 to 108 months. Supervised release range would  
16 be one to three years. Defendant would still not be eligible  
17 for probation. The fine range would be \$15,000 to \$150,000.  
18 Restitution is not applicable, and there's a \$100 special  
19 assessment. Do the parties agree that those would be the  
20 correct adjusted guidelines?

09:52 21 **MR. GOLDEN:** Yes, Your Honor.

09:52 22 **MR. HIGHTOWER:** Yes. Under the Court's rulings, yes,  
23 Your Honor.

09:52 24 **THE COURT:** All right. Mr. Simmons, you have what is  
25 known now as the right of allocution. That's your opportunity

1 to address the Court and say anything you would like to say on  
2 your own behalf. You may address the Court yourself if you  
3 wish, or if you would prefer that your attorney speak for you,  
4 that's fine, too. It's entirely up to you. But I would like  
5 you to come forward, please, and go ahead and take the oath.  
6 If you do choose to speak, I will require you to be under oath.  
7 Please raise your right hand, sir.

09:52 8 (DEFENDANT SWORN).

09:52 9 **THE COURT:** Anything you would like to say, Mr.  
10 Simmons?

09:52 11 **THE DEFENDANT:** Yes, Your Honor. First, I want to  
12 apologize to the Court, to my wife Glenda, who is not here, and  
13 to the family and all the people that have been affected by my  
14 lack of judgment and disregard. I think in terms of my career,  
15 the 36 years that I have been a professional, the last several  
16 years is not the true reflection of who I am, a country boy  
17 growing up in Amite County and coming to the Mississippi Gulf  
18 Coast for the last 35, 36 years. So I do take responsibility  
19 for lack of judgment, and I apologize to all that have -- will  
20 be affected by it. I just pray upon the Court that given all  
21 of these things and the totality of what I've been engaged and  
22 involved in over the years is not what has occurred in the most  
23 recent past. Thank you.

09:53 24 **THE COURT:** Thank you. Anything you want to add, Mr.  
25 Hightower?



09:53 1           **MR. HIGHTOWER:** Your Honor, I would like to add, and  
2 we included this in our response to the presentence  
3 investigation report, I do think that in addition to what Mr.  
4 Simmons has indicated, that while the government's motion  
5 regarding his -- Mr. Simmons' efforts is greatly appreciated,  
6 that I think the Court knows from what it has reviewed in  
7 camera that that -- it was -- the assistance was serious, and  
8 it was substantial and at great risk to Mr. Simmons,  
9 particularly in light of what we know today. I don't think  
10 that, you know, that Mr. Simmons ought to escape punishment in  
11 any way, but what I do think is that this Court has to fill in  
12 where the guidelines leave off, and I don't think that a  
13 sentence at 87 to 108 months would be appropriate in Mr.  
14 Simmons' case. I think that under the other factors that the  
15 Court can consider, that a greater reduction would certainly be  
16 warranted.

09:55 17           I think that, in addition to that, there have been public  
18 officials that have been punished already and others charged  
19 with inappropriate conduct, and while that is not binding on  
20 this Court at all, I think it is worthy of consideration in  
21 terms of what would be appropriate. And I think that the Court  
22 ought to consider that when it renders its final decision with  
23 respect to Mr. Simmons' punishment. Thank you, sir.

09:55 24           **THE COURT:** Anything you want to add on behalf of the  
25 government, Mr. Golden?

09:55 1 **MR. GOLDEN:** No, Your Honor.

09:55 2 **THE COURT:** All right. I believe there was a  
3 recommendation for a sentence in a particular range of the  
4 guidelines.

09:55 5 **MR. GOLDEN:** Well, the government stands by its  
6 original recommendation, Your Honor, which is the bottom  
7 25 percent of the guideline range. Yes.

09:56 8 **THE COURT:** All right. For the record, I find that  
9 recommendation would be appropriate in light of the  
10 circumstances of this case and the defendant's lack of criminal  
11 history and the information contained in the presentence  
12 report. So for the record, the Court accepts the government's  
13 recommendation of a sentence in the lower 25 percent of the  
14 guideline range.

09:56 15 Mr. Simmons, one other thing I need to explain to you,  
16 sir. Part of your plea agreement involved a waiver of your  
17 right to appeal your conviction and sentence. If for some  
18 reason, however, you were going to try to appeal or wish to try  
19 to appeal anyway, I need to explain to you that you would have  
20 14 days from the date I enter a written judgment to file any  
21 such appeal. You can ask your attorney to file it for you. If  
22 he will not or cannot, then you can file it yourself. All you  
23 have to do is write out on a piece of paper that you want to  
24 appeal and submit it to the clerk of the court. But you need  
25 to understand you only have 14 days to do that from the time I

1 enter a written judgment. Do you understand that, sir?

09:57 2 **THE DEFENDANT:** Yes, Your Honor.

09:57 3 **THE COURT:** Further, if for some reason you were  
4 unable to pay the cost of an appeal, you could request to  
5 appeal in forma pauperis, which means to appeal and have the  
6 costs waived. Again, all you would need to do is submit a  
7 written request to the clerk's office to that effect. Do you  
8 understand that?

09:57 9 **THE DEFENDANT:** Yes, I do, Your Honor.

09:57 10 **THE COURT:** All right. You may be seated. Thank  
11 you.

09:57 12 This matter is before the Court for sentencing, and I have  
13 considered the record in this case, the presentence  
14 investigation report, the addenda, the advisory guideline  
15 calculations and the record made here today. I must also take  
16 into account the statutory sentencing factors found at Title  
17 18, United States Code, Section 3553. In this case I find the  
18 following factors are relevant, the nature and circumstances of  
19 the offense, the history and characteristics of the defendant.

09:58 20 It is true that the defendant has a lengthy history of  
21 employment, apparently distinguished up until his involvement  
22 in this offense, has no criminal history. Those are factors  
23 the Court considers. The circumstances of the offense are one  
24 that involve payment of bribes to public officials, two  
25 different ones, for a number of contracts which, according to

1 the indictment in this case or the bill of information in this  
2 case, stretched over a period of years over the entire course  
3 of conduct, beginning sometime in or about 2005 until around  
4 August of 2014. So that's another factor the Court considers,  
5 the length of time that this went on.

09:59 6 The sentence needs to reflect the seriousness of the  
7 offense. These types of offenses are very serious. They  
8 involve conduct that calls into question the integrity of our  
9 public institutions, and for that reason, the Court must take  
10 them very seriously as well. They are offenses that are often  
11 difficult to detect and can be difficult for the government to  
12 bring to court. So that's another factor.

10:00 13 The sentence needs to promote respect for the law and  
14 afford a just punishment. This type of conduct reflects a lack  
15 of respect for the law and its public institutions and for the  
16 integrity of public officials, often, as in this case, in an  
17 effort to profit one's self. While Mr. Simmons certainly did  
18 not receive \$6 million out of this scheme, he did earn some  
19 consulting fees for which he would likely not have been  
20 eligible were it not for the access he was able to take  
21 advantage of to procure these contracts for his clients.

10:01 22 It is about punishment as well. Punishment is part of  
23 sentencing, but it's about a just punishment. Punishment needs  
24 to be fair and fit the circumstances of the offense and the  
25 history and characteristics of the defendant. It needs to

1 afford adequate deterrence to criminal conduct. This type of  
2 conduct needs to be deterred. Certainly Mr. Simmons needs to  
3 be deterred from engaging in this type of conduct ever again,  
4 but it also needs to serve as a deterrent effect for others out  
5 there who may be engaged or inclined to engage in this type of  
6 behavior.

10:02 7 It needs to protect the public. While these certainly are  
8 not violent offenses, and while Mr. Simmons is not a violent  
9 person or a physical threat to anyone, they are a threat to the  
10 public in the sense that they threaten the integrity of our  
11 democratic institutions of government. So the Court takes all  
12 of those factors into consideration in fashioning a sentence in  
13 this case.

10:02 14 Further, I think Mr. Hightower intimated this, that  
15 another factor in sentencing is to avoid unwarranted  
16 disparities in sentencing. Of course, Mr. Simmons is the only  
17 defendant in this case, so as among defendants in this case,  
18 there's no measure by which the Court can look at that. I am  
19 aware of sentences in other cases. Of course, every case is  
20 very different. The amounts involved are different. And  
21 sometimes in reaching plea agreements, plea bargaining, that  
22 pleas are reached which allow someone to enter a plea before an  
23 indictment is returned, which might include even more conduct  
24 in an effort to resolve the case quickly. That can affect  
25 sentences.

10:03 1 Certainly I'm aware of the broader case that was  
2 referenced earlier before Judge Wingate. I don't know any of  
3 the specifics about it. Of course, as far as this Court is  
4 aware, none of those individuals have been sentenced yet, so I  
5 have nothing to measure against as far as those individuals go,  
6 although it seems fairly evident to the Court that certainly as  
7 between Mr. Simmons and Mr. Epps, the scope of the conduct  
8 involved is likely far, far broader as it relates to Mr. Epps  
9 than Mr. Simmons. But again, it is unknown at this time what  
10 loss amounts might be attributed to Mr. Epps or what other type  
11 of consideration he might receive based upon his conduct.

10:04 12 So I'm aware of that issue, as Mr. Hightower has  
13 mentioned, but also somewhat constrained by some of the factors  
14 that I've just mentioned in terms of trying to approximate what  
15 would be the right sentence as it relates to others. But I do  
16 have enough information before me to fashion a sentence in this  
17 case.

10:05 18 And having considered the advisory guideline calculations  
19 and other sentencing factors found at Title 18, United States  
20 Code, Section 3553, the Court will impose sentence as follows.  
21 It is hereby the judgment of the Court that the defendant,  
22 Robert Simmons, is hereby committed to the custody of the  
23 Bureau of Prisons for a term of 87 months as to Count 1 of the  
24 indictment. The Court is of the view that under the nature and  
25 circumstances of this case, a sentence at the bottom of the

1 guideline range is appropriate and strikes the appropriate  
2 balance, given the facts of this case.

10:06 3 It is further ordered that the defendant shall pay a fine  
4 in the amount of \$10,000, which is payable immediately and  
5 during the term of incarceration. The fine is a downward  
6 departure from the prescribed guideline fine range and is based  
7 upon the defendant's ability to pay. The Court finds the  
8 defendant does not have the ability to pay interest on the  
9 fine. The interest on the fine will be waived. Any balance  
10 remaining on the fine upon release from imprisonment shall be  
11 paid in monthly installments of no less than \$200 per month.  
12 In ordering this nominal payment, the Court recognizes the full  
13 amount may not be paid in full prior to the termination of  
14 supervised release. In the event that the full amount is not  
15 paid prior to the termination of supervised release, the  
16 defendant is ordered to enter into a written agreement with the  
17 financial litigation unit of the U. S. Attorney's Office for  
18 payment of the remaining balance.

10:07 19 In addition, the value of any future discovered assets may  
20 be applied to offset the balance of criminal monetary  
21 penalties. The defendant may be included in the Treasury  
22 Offset Program allowing qualified federal benefits to be  
23 applied to offset the balance of criminal monetary penalties.

10:07 24 Upon release from imprisonment, the defendant shall be  
25 placed on supervised release for a term of three years as to

1 Count 1. Within 72 hours of release from the custody of the  
2 Bureau of Prisons, the defendant shall report to the probation  
3 office in the district to which he is released. While on  
4 supervised release, the defendant shall comply with the  
5 mandatory and standard conditions which are listed on the  
6 judgment and commitment order, and he shall not possess a  
7 firearm.

10:07 8 The record reflects that the defendant does not have a  
9 history of alcohol abuse or drug abuse. Therefore, the drug  
10 testing condition will be suspended.

10:07 11 In addition, the following special conditions are imposed:  
12 Number one, the defendant shall provide the probation office  
13 with access to any requested financial information. Number  
14 two, the defendant shall not incur new credit charges or open  
15 additional lines of credit without the approval of the  
16 probation office unless the defendant is in compliance with the  
17 installment payment schedule. These conditions are imposed in  
18 light of the fine imposed in this matter to facilitate payment  
19 of the fine and compliance with the defendant's financial  
20 obligations. It is further ordered that the defendant pay a  
21 special assessment of \$100, which is due immediately.

10:08 22 The Court notes that if it erred in treatment of any of  
23 the guidelines in this case, the Court would have imposed the  
24 same sentence as a variance or nonguideline sentence based upon  
25 its analysis of the Section 3553 factors as stated earlier.



1           The Court recommends that the defendant be designated to  
2 an institution closest to his home for which he is eligible for  
3 the purposes of visitation. And the defendant is to  
4 voluntarily surrender to the institution designated by the  
5 Bureau of Prisons within 72 hours of designation by the Bureau  
6 of Prisons but no later than 60 days from the date of this  
7 judgment. That will be the judgment of the Court.

8           Anything further?

9           **MR. HIGHTOWER:** No, Your Honor.

10          **MR. GOLDEN:** No, Your Honor.

11          **THE COURT:** This matter is adjourned. We will take a  
12 short recess.

13                               (SENTENCING CONCLUDED)

CERTIFICATE OF COURT REPORTER

I, Teri B. Norton, RMR, FCRR, RDR, Official Court Reporter for the United States District Court for the Southern District of Mississippi, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings reported by me using the stenotype reporting method in conjunction with computer-aided transcription, and that same is a true and correct transcript to the best of my ability and understanding.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

*S/ Teri B. Norton*  
TERI B. NORTON, RMR, FCRR, RDR  
OFFICIAL COURT REPORTER